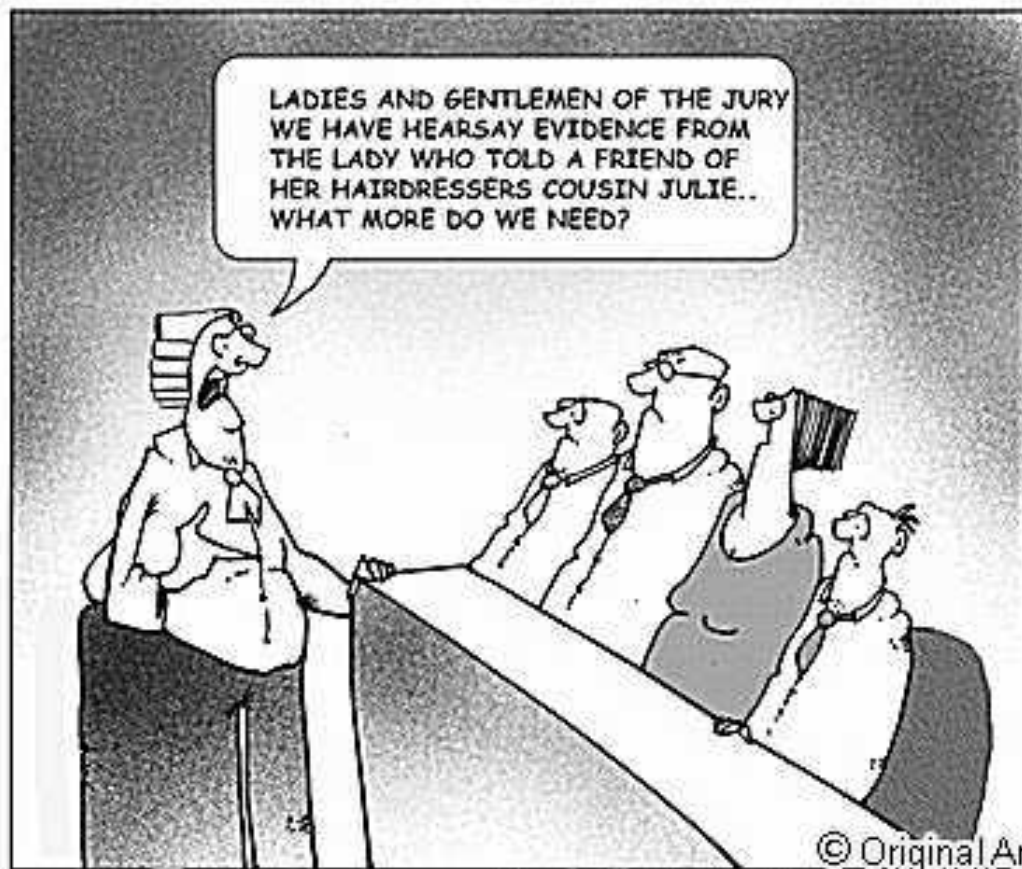


Can We Hear What They Say?

Indiana Judicial Conference

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What is Hearsay?

- Out-of-court statement
- Offered in Court
- Offered for "***the truth of the matter asserted***"
 - *"Jim told me he signed the contract without making any changes."*
 - *"I signed the contract without making any changes."*
 - *"Jim told me the contract would be signed at the bank so I went to the bank."*

Definitions for Hearsay

- 801(A): A "*statement*" is:
 - (1) an oral or written assertion; or
 - (2) nonverbal conduct
if intended as an assertion.

Definitions for Hearsay

- 801(b): A "*Declarant*" is:
 - A person
 - Who makes statement

“Not Hearsay” – 801(d)(1)

- Prior Statements by a Witness
 - Declarant testifies at trial
 - Subject to cross-examination
 - Statement is:

“Not Hearsay” – 801(d)(1)(A)

- **Inconsistent with testimony and:**
 - Previously given under oath:
 - At trial;
 - Hearing;
 - Other proceeding; or,
 - Deposition

“Not Hearsay” – 801(d)(1)(B)

■ Consistent with trial testimony

- Offered to rebut:**
- Recent fabrication;**
- Improper influence; or motive**
- Before motive to fabricate arose**

“Not Hearsay” – 801(d)(1)(C)

- Statement of identification
 - Of a person
 - After perceiving

“Not Hearsay – 801(d)(2)

- Admission by party opponent
 - Out of court statement
 - Offered against a *party*

AND

“Not Hearsay” – 801(d)(2)

- (A) Party's own statement
 - Individual or representative
- (B) Statement party has adopted
- (C) Statement party authorized
- (D) Statement by Agent or Servant
 - Within scope and during relationship
- (E) Statement by co-conspirator
 - During course to further conspiracy

The Rule – 802

- Hearsay is not admissible –
except as provided:
 - Rules of Evidence
 - Law

Hearsay Analysis

- Non-hearsay 801(d)
 - Made under oath previously
 - Prior consistent statement
 - Statement of identity
 - Statement by party opponent
 - Statement by by agent
 - Statement by co-conspirator
- Not offered for truth

Hearsay Analysis

Out of court
statement



HEARSAY



Not Hearsay
801(d)



ADMIT

EXERCISE 1

- In a summary judgment hearing, Defendants seek to strike a portion of an experts affidavit which relied on two hearsay documents. The affidavit referenced the two documents and identified them as "the type of information normally relied upon by me in the field of my experience in providing opinions." How do you rule on the Defendants motion to strike the affidavit as hearsay?

The Rule – 802

- Hearsay is not admissible –

except

Hearsay Exceptions

- 803 Exceptions
 - Hearsay is admissible
 - Witness unavailability is immaterial
- 804 Exceptions
 - Hearsay is admissible
 - Apply where witness is unavailable
- 807 Exception **FEDERAL ONLY**
 - A residual exception
 - Prior notification required

Unavailability - Defined

- Privileged
- Persistent refusal
- Lack of memory
- Death or illness
- Process won't work
- *Caution* – proponent can not procure

UNAVAILABILITY

- Dead
- Absent
- Forgetful
- Uncooperative

803 Exceptions

- 23 in number
- unavailability is not required

Hearsay Exceptions – 803(1)

- Present sense impression –
 - Explains event or condition
 - Made when or immediately after
 - Declarant perceived

“I just saw Sue run that red light.”

Hearsay Exceptions – 803(2)

- Excited utterance
 - About startling event or condition
 - While declarant stressed or excited

“My husband hit me with his fist and made my nose bleed.”

Hearsay Exceptions – 803(3)

- Then existing mental, emotional, or physical condition – 803 (3)
 - Statement about declarant's:
 - State of mind
 - Emotion
 - Sensation
 - Physical condition
 - Not including statement of memory or belief
 - Unless it is about Declarant's will

"My head hurts."

EXERCISE 2

- In an action to contest a will due to the testators unsound mind and for undue influence, Plaintiffs planned to present evidence of statements made by the Testator that she did not want H to have anything; that she was good friends with L, that she was never close to House, and that it was H's idea to give a family member her power of attorney; that she was afraid of House and that she planned for L to be heirs to her farm and house, but she changed her will against her wishes because H was family. Prior to trial the Defendants file a motion *in limine* to exclude the admission of this evidence for the purpose of establishing undue influence. How do you rule?

Hearsay Exceptions – 803(4)

- Statements for diagnosis or treatment
 - *Statement to get treatment or diagnosis*
 - *May describe*
 - *Medical history*
 - *Current or prior symptoms*
 - *Pain or sensation*
 - *Inception*
 - *Cause - if pertinent to diagnosis or treatment*

***“My neck began hurting
after the collision”***

Hearsay Exceptions - 803(5)

- Past Recollection Recorded – 803(5)
 - Witness with knowledge now lacks recall
 - Insufficient to testify fully and accurately
 - Writing made or adopted by witness
 - When matter was fresh in memory
 - Made to correctly reflect knowledge

EXERCISE 4

- At trial the witness is unable to recall her statement made at the scene of the accident that the Defendant entered the intersection on a red light. The Plaintiff's counsel hand the witness her written statement made to the police officer. The witness indicates the statement is her statement made at the scene and it is accurate. The Plaintiff offers the statement into evidence as asks to pass it to the jury. Defense counsel objects on the basis of Hearsay. How do you rule?

Hearsay Exceptions - 803(5)

- Past Recollection Recorded – 803(5)
 - Witness with knowledge now lacks recall
 - Insufficient to testify fully and accurately
 - Writing made or adopted by witness
 - When matter was fresh in memory
 - Made to correctly reflect knowledge
 - May read from document
 - Writing not admitted **unless** opponent offers

Exercise 8

- In a case for the termination of parental rights, the OFC offers as exhibits reports compiled by a third party retained to supervise visitations. The Reports were routinely and regularly kept by the agency and forwarded monthly to OFC. The sponsoring witness testified that the reports were made from the personal knowledge of the staff member who compiled the reports and that staff were required to report accurately their first hand observations. The documents included statements made by third parties such as the aunt reports that the father The parents object to the admission based upon hearsay. How do you rule?

Hearsay Exceptions – 803(6)

- Business Records
 - Any form of data compilation
 - About acts, events, conditions, opinions or diagnoses
 - Made at or near the time
 - By or from information transmitted by a person with knowledge
 - Kept in the regular course of business
 - Regular business practice to make that business record

Hearsay Exceptions – 803(6)

- “Business” includes any:
 - Business
 - Institution
 - Association
 - Profession
 - Occupation
 - Calling of every kind
- Can be profit or non-profit

Hearsay Exceptions – 803(7)

- Absence of entry in business record
- May prove nonexistence if
 - Record made as required in Business record exception
 - Matter is kind that would normally have been included
 - Unless source or circumstances indicate untrustworthiness

Hearsay Exceptions – 803(8)

- Public records or reports
 - Unless indications of untrustworthiness
 - Data compilations in any form
 - Kept by public agencies or offices
 - Regarding regularly conducted activities
 - Observed by duty imposed by law
 - Where a duty to report
 - Or factual findings from investigation pursuant to authority granted by law

Hearsay Exceptions – 803(8)

- EXCEPTION DOES NOT INCLUDE
 - Investigative reports by police offered against accused
 - Investigative reports offered by agency in civil case where agency is a party
 - Factual findings by government in criminal case
 - Factual findings in special investigation unless offered by accused in criminal case

Hearsay Exceptions – 803(9)

- Records of vital statistics
 - Data compilation in any form
 - Regarding births, fetal deaths, deaths, or marriages
 - Reported to public office pursuant to law

Hearsay Exceptions

803(10)

- Absence of public record
 - To prove absence of public record
 - To prove nonexistence or nonoccurrence of matter for which record normally made
 - May testify that a diligent search found no record
 - Or submit a certification of records

Hearsay Exceptions – 803(11)-(15)

- (11) Records of religious organizations
- (12) Marriage and baptismal certificates
- (13) Family Records
- (14) Record of documents effecting interest in property
- (15) Statements in documents affecting an interest in property

Hearsay Exceptions – 803(16)-(17)

- (16) Statements in Ancient documents
 - Document is over thirty years old
 - Established Authenticity
- (17) Market reports, commercial publications
 - Lists, directories, tabulations, market quotations or other published compilations
 - Relied on by public or a particular occupation

Exercise 3

- In a prosecution for possession of precursors used in the manufacture of methamphetamine, the prosecution offers the opened boxes found in defendant's vehicle and the unopened blister packs for cold medicine found on the defendant's person at the time of his arrest to prove that the defendant was in possession of ephedrine, a precursor to methamphetamine. Defendant objects that the package labels contained on the opened boxes are hearsay. How do you rule?

Hearsay Exceptions – 803(18)

■ Learned Treatises

- Expert's attention on cross
- Or relied on by expert in direct
- Published treatise, periodical or pamphlet
- History, medicine, or other science or art
- Reliability established by: expert's admission, other expert testimony or judicial notice
- May read but not admit

Hearsay Exceptions – 803(19)-(23)

- (19) Reputation of personal or family history
- (20) Reputation of boundaries or general history
- (21) Reputation as to character
- (22) Judgment of previous conviction
- (23) Judgment of personal, family, general history or boundaries

804 Exceptions

- These require unavailability
- 804(a) defines unavailability
 - Privileged
 - Persistent refusal
 - Lack of memory
 - Death or illness
 - Process won't work
 - *Caution* – proponent can not procure

Hearsay Exceptions – 804 (b)(1)

■ Former testimony

- Witness testified at prior hearing or other proceeding
- Opponent in criminal proceeding
- Opponent's predecessor in interest in civil proceeding
- Had opportunity and similar motive
- To develop testimony by direct, cross or redirect

Hearsay Exceptions – 804(b)(2)

- Statements under belief of death
 - In homicide prosecution
 - In civil cases
 - Statements
 - Declarant believes death is imminent
 - Cause or circumstances of what declarant believes is impending death

Hearsay Exceptions – 804(b)(3)

- Statements against interest
 - At time made
 - Contrary to declarant's fiscal interest; or
 - Tends to subject to civil or criminal penalties or renders a claim invalid
 - Reasonable person would not make unless true
 - Confessions by co-defendants and others that implicate defendant and declarant are not in this exception

Hearsay Exceptions – 804(b)(4)

- Statements about birth, adoption, marriage, divorce, legitimacy, relationship, ancestry or similar matters of family or personal history
 - Declarant's own situation even though can not have personal knowledge
 - About third person if declarant likely to have accurate knowledge because of family relationship or close association

Hearsay Exceptions – 804(b)(6)

- Forfeiture by wrongdoing
 - Statement offered against
 - a party who engaged or acquiesced
 - In wrongdoing
 - Intended to or likely to, and DID
 - Cause declarant to be unavailable

Hearsay Exceptions – 807

- Where 803 and 804 do not apply
- Similar trustworthiness as in 803 or 804
- The Court finds
 - Material
 - Most probative
 - Purpose of rules and Justice served by admission
- Must give advance notice to opponent
 - Particulars of statement
 - Name and address of declarant
 - Fair opportunity to meet the statement

Hearsay - 806

- Attacking and supporting credibility of declarant
 - Hearsay statement or “not hearsay” statement under 801(d)(2)(C)(D) or (E) admitted
 - Declarant’s credibility may be:
 - Attacked
 - Supported, if attacked
 - By any evidence admissible if declarant had testified

Hearsay in Hearsay - 805

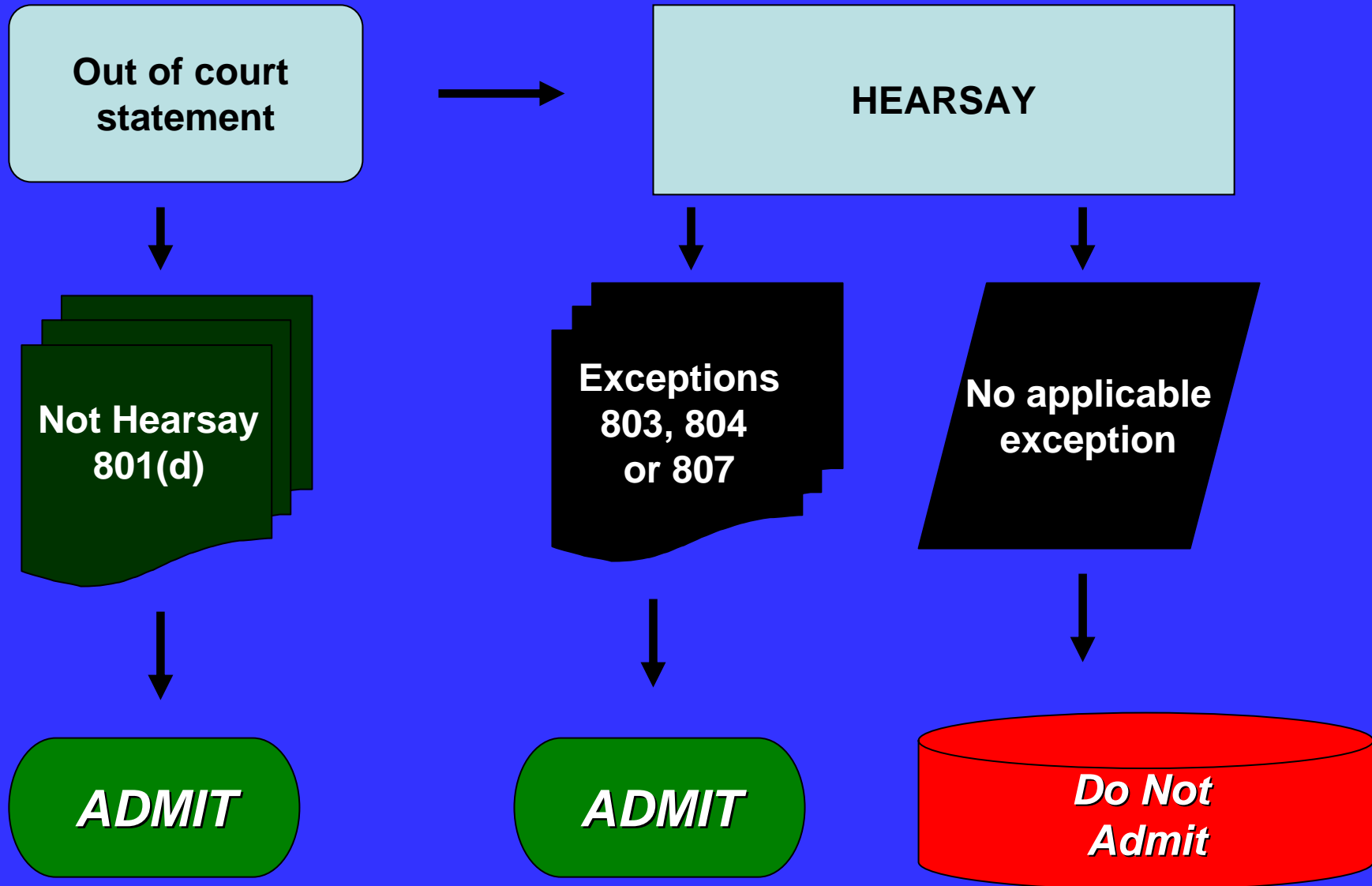
- Hearsay within hearsay is not excluded IF each part of the combined statement conforms with an exception to the hearsay rule provided in these rules.
- These rules – 803, 804

The Rule – 802

- Hearsay is not admissible –

except

Hearsay Analysis



Confrontation Clause

- In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him

Ohio v. Roberts, 100 S. Ct. 2531, (1980).

hearsay statements made by an unavailable witness were admissible against a criminal defendant if the statement fell "within a firmly rooted hearsay exception" or otherwise bore "particularized guarantees of trustworthiness"

Crawford v. Washington,
124 S. Ct. 1354, 1374
(2004).

when the prosecution seeks to introduce a "testimonial" out-of-court statement into evidence against a criminal defendant, the *Confrontation Clause of the Sixth Amendment* requires two showings:

Crawford v. Washington

- (1) that the witness who made the statement is unavailable; and
- (2) that the defendant had an opportunity to cross-examine the witness

Testimonial Defined

- Majority expressly declined to define
- Minority, would have retained Roberts and castigated the majority for not defining "testimonial,"
- "Rules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner"

Guidance and Examples

- "testimonial" does not require an oath
- ex parte in-court testimony or its functional equivalent
- Statements in formal testimonial materials

Guidance and Examples

- Under circumstances which would lead an objective witness reasonably to believe statement would be available for later trial
- Some statements qualify under any definition – such as *ex parte* testimony at a preliminary hearing.
- Statements taken by police officers in course of interrogation are “testimonial” under even a narrow standard.
- statements declarant would reasonably expect to be used prosecutorially

Interrogation

- Think colloquially not technically
- Court declined to precisely define "police interrogation"
- compared police "interrogation" to official pre-trial examinations of witnesses by English magistrates
- "under any conceivable definition" where the witness knowingly gave a recorded statement "in response to structured police questioning" interrogation had occurred

Unavailability

- Prong 1 of *Crawford* – Witness must be Unavailable
- Unavailability is:
 - Dead
 - Absent
 - Forgetful
 - Uncooperative

Opportunity to Cross

- Prong 2 of *Crawford*
- Opportunity to cross is required
- Reality of Cross is not the question

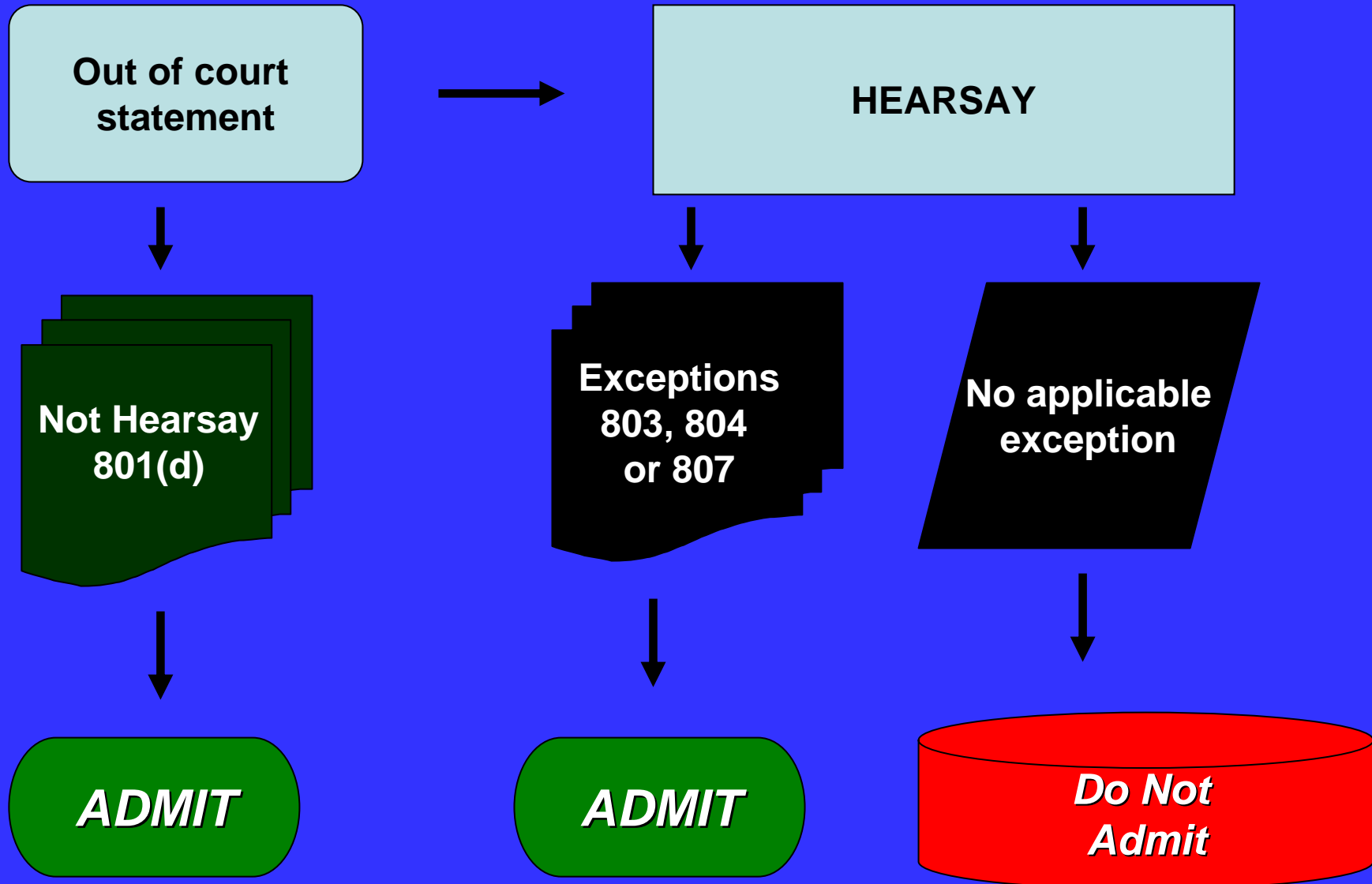
The *Crawford* Analysis

- Is it a criminal case?
 - If no – *Crawford* does not apply
 - If yes – analysis continues
- Is the witness unavailable?
 - If no – *Crawford* does not apply
 - If yes – analysis continues

The *Crawford* Analysis - Continued

- Is statement testimonial?
 - If no – *Crawford* does not apply
 - If yes – Analysis continues
- Did Defendant have an opportunity to Cross Examine
 - If yes – may admit under *Crawford*
 - If no – *Crawford* prohibits admission

Hearsay Analysis



Exercise 5

- Defendant is charged with stealing fiancée's parent's credit card. Fiancée testifies at Defense request at preliminary hearing that she permitted the Defendant to live in her parent's home but did not tell him she had their permission to use their credit cards. At trial witness is not present and can not be found. State wishes to offer the transcript of the preliminary hearing at trial. How do you rule?

Exercise 6

- See your handout

Exercise 7

- Husband is charged with domestic battery. When police arrived at scene they encountered wife who was sobbing and nearly hysterical. The Officer asked what was happening. Wife stated "My husband just beat me." At trial 6 months later Wife refuses to testify and will not honor her subpoena. The State seeks to admit the statement made to the officer. How do you rule?